SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1886

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THE STATE OF TEXAS
EX REL RICHARD VOGTSBERGER,
Appellant - Petitioner

vs.

THE CITY OF WICHITA FALLS, TEXAS
Appellee - Respondent

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# MOTION TO DISMISS

or in the alternative,

# MOTION TO AFFIRM

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Comes now the City of Wichita Falls, Texas, and respectfully moves the court to dismiss the appeal in this cause, or in the alternative, to affirm the judgment of the Supreme Court of Texas, on the grounds hereinafter set out.

## GROUNDS

1. The federal question sought to be reviewed herein was not timely nor properly raised nor expressly passed on by the state courts.

2. The appeal does not raise a substantial federal question.

## FIRST GROUND RESTATED

The federal question sought to be reviewed herein was not timely nor properly raised nor expressly passed on by the state courts.

The federal question raised in this appeal is as follows: Is a single newspaper publication adequate notice as required by the due process clause of the Fourteenth Amendment as a prerequisite to annexation hearings leading to final passage of ordinances including rural territory within a city, when there is no reason that personal notice to affected property owners cannot be given?

In effect, this is an attack on the constitutionality of Section 6 of Article 970a, Revised Civil Statutes of Texas, which requires that a city hold a public hearing prior to annexation proceedings, and that notice of such hearing be published at least one time in a newspaper having general circulation in the city and in the territory proposed to be annexed (it requires no personal notice, except to railroad companies whose right-of-way is included in the territory to be annexed).

This question was not pleaded in the trial court, and it was not timely nor properly raised nor expressly passed on by the Texas Supreme Court.



With regard to the pleadings, the only pleading made by the State raising a constitutional question was Paragraph 13, which said, inter alia:

"The process of annexation and the resulting expansion of the extraterritorial jurisdiction violates the equal protection and due process clauses of the United States and Texas constitutions in that such process is a taking of property without compensation and without representation of and by the damaged person or persons. The process is a unilateral action by the Respondent. . . . This unilateral action effectively preempts the territory within such extraterritorial jurisdiction and prevents the free use thereof by its owners, including the Relator."

Obviously, this pleading does not allege that the city unconstitutionally failed to give the owners of the land personal notice. It is alleging that the annexation of land by a city, without the request nor consent of the owners of such land, which owners have no representation on the governing body of the city, constitutes an unconstitutional taking of such land. Therefore, this pleading did not raise the question presented in the present appeal.

The only pleading by the State in the trial court attacking the notice was in Paragraph 10 (TR 32) which alleged that the notice was insufficient as a matter of law in that it failed to state what county the territory to be annexed is situated in. The implication of this pleading is, of course, that the published notice would not be objectionable if it had named the county. It was not an allegation that the notice should have been served personally,

rather than by publication in a newspaper.

Further, the question was not timely nor properly raised nor expressly passed on by the Texas Supreme Court. In its Conditional Motion for Rehearing in the Court of Civil Appeals, and in its Conditional Application for Writ of Error, the State brought forward only the question of the sufficiency of the description of the property annexed (and one other point not material here). Here again, the implication was that, if the description had been sufficient, the published notice would not have been objectionable.

Rule 476, Texas Rules of Civil Procedure, states, "Trials in the Supreme Court shall be only upon the questions of law raised by the assignments of error in the application for writ of error . . ."

In Pacific Fire Insurance Company vs. Donald, 224 SW2d 204 (Tex. S. Ct., 1949) the Supreme Court stated, "This Court is limited to a consideration of the points contained in an application for writ of error, and all other points relied upon in the trial court and Court of Civil Appeals, and not contained in the application for writ of error, are waived."

Therefore, the question as to whether the due process clause required that the City give personal notice to affected property owners prior to the annexation was not considered nor passed on by the Texas Supreme Court.

## SECOND GROUND RESTATED

The appeal does not raise a substantial federal question.

The State of Texas has cited no cases holding



that the due process clause requires personal notice to a landowner that his property is being considered for annexation by a city. Their authorities concern suits to settle accounts of pooled trusts, eminent domain cases, cases where water is diverted from a river, and class actions against brokerage firms for violations of antitrust and securities laws.

On the other hand, there is case law contrary to the position which the State of Texas has taken in this appeal. In Hunter vs. City of Pittsburgh (1907), 207 U.S. 161, 52 L. Ed. 151, 28 S. Ct. 40, certain landowners whose land had been annexed to the City of Pittsburgh, without their consent and against their protests, alleged that this deprived them of their property without due process of law, by subjecting it to the burden of additional taxation. This Court overruled this contention, saying that the City of Pittsburgh could take this action, in the manner in which they did it, unrestrained by any provision of the Federal Constitution.

In City of Cedar Rapids vs. Cox (Iowa Supreme Court, 1958) 93 NW2d 216, appeal dismissed, 3 L. Ed.2d 976, certain landholders contended that the state statute authorizing notice of proceedings for annexation of territory to a city by publication violates the due process requirements of the Federal Constitution. This is exactly the same position that the State of Texas is taking in this appeal. The Supreme Court of Iowa overruled this contention. The landowners in that case also relied on Mullane vs. Central Hanover Bank & Trust Company, but the Iowa Supreme Court held that such case was inapplicable here. The Court followed Hunter vs. City of Pittsburgh instead. The Iowa

Court said, "To uphold the contention of Appellants now considered might put in jeopardy numerous decrees of annexation on notice by publication. Obviously we should not reach a decision of such far-reaching implications unless the right thereto is clear."

On May 18th, 1959, the United States Supreme Court dismissed the appeal in Cedar Rapids vs. Cox for want of a substantial federal question.

## CONCLUSION

As the federal question sought to be reviewed herein by the State of Texas was not timely nor properly raised nor expressly passed upon by the State courts and as the appeal does not raise a substantial federal question, the City of Wichita Falls prays that this appeal be dismissed, or in the alternative, that the judgment of the Supreme Court of Texas be affirmed.

Respectfully submitted,

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Attorney for the City of
Wichita Falls, Texas,
Appellee - Respondent



## CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the above and foregoing motion on the Appellant - Petitioner, State of Texas, by depositing two copies of same in the United States Post Office, addressed to Douthitt & Mitchell at their post office address, and by depositing one copy in the United States Post Office, addressed to Paul O. Wylie, at his post office address, with first class postage prepaid, on the 4th day of October, 1976.

Henry P. Hodge, Jr.
Attorney for Appellee - Respondent